Nos. 136, 135 & 138.

Brief of Whalley & Muir for

Filed Nov. 1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE STEAM TUG "RESOLUTE," A. B HAMMOND, and E. L. BONNER,
Claimants and Appellants.
vs.
HENRY R. WILSON, SIDNEY G. WOLFKILL, THOMAS NELSON & CHARLES JAHN,
Libellants and Respondents.
No. 16,200

THE STEAM TUG "RESOLUTE," A. B. HAMMOND and E. L. BONNER,
Claimants and Appellants.
vs.
GEORGE DOWSETT,
Libellant and Respondent.
No. 16,199

THE STEAMER "THREE SISTERS," THE OREGON CENTRAL AND EASTERN RAILROAD COMPANY,
Claimants and Appellants.
vs.
R. J. YOUNG, M. BELL, C. A. BELL, H. ROBERTSON, W. HOWELL, W. H. SUTTON, *et al*,
Libellants and Respondents.
No. 16,202

Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR APPELLANTS

IN REPLY ON MOTION TO DISMISS APPEALS.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

WILLIAM T. MUIR,
Of Proctor for Claimants.

The Lewis & Dryden Printing Co.
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The argument filed for the respondents, found on pages 3 to 10, inclusive, of their brief, assumes the point in issue. It is there stated that no appeal lies

to this court in these cases, because the court below had jurisdiction of the parties and of the *subject matter* of litigation, and that if any error was committed it was error on the merits which cannot be considered here.

The only point insisted upon by appellants is that the lower court did not have jurisdiction of the *subject matter* of the litigation. The method of discussion pursued does not alter this fact. The argument made under subdivision 2, pages 22 to 38 of our original brief, is intended to show that, owing to the circumstances attendant upon the transactions set out in the amended libels, no right of action *in rem or in personam* arose in favor of the libellants of which a court of admiralty could take cognizance. The ultimate reason, as explained on pages 37 and 38 of the brief mentioned, is because the contracts pleaded are not maritime contracts.

And the argument made under subdivision 3, pages 38 to 52 of our former brief, is designed to show that the matters alleged in the amended libels have passed to final judgment and cannot form the *subject matter* of litigation in a court of admiralty or any other court.

We entirely agree with the authorities quoted in the opposing brief defining the meaning of the term jurisdiction. It is the "power to hear and determine the subject-matter in controversy between parties to a suit." We also agree in the statement there made that "if the law confers the power to render a judgment

or decree, then the court had jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case; is judicial action, by hearing and determining it."

The first question confronting every court in every case, and one which it must determine before examining into the merits, or proceeding to decide "with which party is the right of the case," is whether the court has jurisdiction of the subject-matter of litigation, and then whether it has jurisdiction of the parties thereto. If it has not jurisdiction of the subject-matter, it cannot proceed further, even though the parties are in court willing to proceed. "The question of the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question."

The Lottawanna, 21 Wall. 558, 572.

The Scotland, 105 U. S. 24.

It is held in Taylor v. Carryl, 20 How. 583, 599, 600, that the reasonable interpretation of the constitution "would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law." To the same effect, see

The Scotland, 105 U. S. 24.

The Lottawanna, 21 Wall. 558.

Receiverships were unknown at common law. A receiver's contract has never, until the decision of the lower court, been held to be a maritime contract. So the question here is, whether the rules of equity govern the contracts mentioned in the amended libels, or whether they are governed by admiralty rules. If the rules of equity control, the contracts are equitable. If the rules of admiralty control, the contracts are maritime. If the first is held to be the law, the lower court had no jurisdiction. If the latter is held, it did have. Certainly this is purely and distinctively a question of jurisdiction over the subject-matter. The lower court decided in favor of the admiralty jurisdiction. It held the contracts maritime. We appeal from the decision and ask the judgment of this court upon the correctness of the ruling below. It is held in Insurance Co. v. Dunham, 11 Wall. 31, that "perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed."

And it is held that "there is no jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale, or by transfer of the possession to the mortgagee."

The John Jay, 17 How. 399.

The District Court of the United States, sitting in admiralty, has no jurisdiction of a contract of partnership for the use of a vessel put into a line for carrying passengers and freight. The contract arranged the contributions which each party was to make and the

share of profits to be received; and though one of the parties furnished the vessel, the contract was not a charter party.

Ward v. Thompson, 22 How. 330.

"This court reasserts the doctrine that the circuit court, sitting in an admiralty court, has no jurisdiction to foreclose or give other remedy on a mortgage."

Schuchardt v. Babbidge et al., 19 How. 239.

"The principal question is, whether the case made is within the admiralty jurisdiction. That it would not be within the admiralty jurisdiction in England is clear. In general, contracts upon land, though to be executed upon the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty. There are some exceptions to this rule in that country; but none, it is believed, which affect the question now before us. There are conflicting decisions as to the admiralty jurisdiction in England, and also in this country. It may be difficult, if not impracticable, to state with precision the line of this jurisdiction, but we may approximate it by consulting the decisions of our own courts.

"In the case of Willard v. Dorr, 3 Mason, 91, it was held, 'no suit for services performed by the master, as a factor, or in any other character than that of master, is cognizable in the admiralty.' And again, in Plummer v. Will, 4 Mason C. R. 380, it was said, 'a contract

of a special nature is not cognizable in the admiralty, merely because the consideration of the contract is maritime. The whole contract must, in its essence, be maritime, or for compensation for maritime service.' In 11 Peters, the Steamboat Orleans v. Phoebus, it was said the admiralty has no jurisdiction in matters of account between part owners. And, further, 'the jurisdiction of courts of admiralty, in case of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called.' (Ib.)

"The jurisdiction of courts of admiralty is limited, in matters of contract, to those, and to those only, which are maritime. (Ib.)

"An agreement by the master of a vessel to pay wages may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law. (L. Arira v. Manwaring, Bee's Rep. 199.) The admiralty jurisdiction of the District Courts of the United States, being exclusive, cannot be extended to cases of law or equity, cognizable by the circuit and state courts, under the 11th section of the judiciary act. (1 Baldwin, 554.)"

Grant et al. v. Poillon, 20 H. 162.

Numerous cases have been brought in the admiralty courts of this country in which the contracts relied upon have been adjudged not to be maritime, and the

jurisdiction has been consequently denied. And the questions thus raised have always been regarded as jurisdictional. They cannot be treated in any other way.

Opposing counsel seems to think that because the vessels were within the territorial jurisdiction of the district court; because they were seized, and because the claimants appeared, the lower court had jurisdiction, and could proceed to hear the case upon the merits. He seems to also think that any ruling thereafter made by the court was a decision upon the merits. And it is argued that this is true because the court, in rendering a decision, must take into consideration the facts appearing. Nothing could be more fallacious. Any one might file a pleading in any kind of a case, and a marshal might seize any kind of personal property, but the fact of the filing of the pleading called a libel, and the fact of the seizure, would not give the court jurisdiction over the cause. The court would have to determine whether the subject-matter of the litigation was maritime. This would depend upon the nature of the contract sued on. If a person should attempt to libel a vessel to foreclose a contract of mortgage of the kind mentioned in the case of the John Jay, *supra*, and the marshal should seize her, these facts would not give the court any right to either hear or determine the controversy. And if it did assume to hear and determine it, an appeal would lie to this court upon the question of the power of the lower court to take cognizance of the cause, and the judgment rendered below would be declared void.

Counsel seems to suppose that, because it is sometimes necessary to consider facts in order to reach a conclusion whether a controversy is within the maritime jurisdiction, the decision of the point is always upon the merits. This is not so. It makes no difference at what stage of the proceeding, whether during the taking of testimony or otherwise, the defect of jurisdiction appears, or how it may arise, it is the duty of the court to at once cease all further cognizance of the cause.

2 Conkling's U. S. Admir. (2d Ed., Rev.), p. 229.

The Maggie Hammond, 9 Wall. 435.

It is stated, on page 4 of the opposing brief, that at the time of the seizures "The Resolute" and "The Three Sisters" were within the district of Oregon, and were lawfully seized by the marshal of the court below. In this statement, as in every other statement in this portion of his brief, counsel has assumed in his favor the question to be decided upon these appeals. Our position is that, while in a sense the seizure was lawful, at the same time it was not rightful. If the court had no jurisdiction of the subject-matter of the action, there was no power to seize, and the seizure having been made, upon a showing that the subject-matter of the action was not within the cognizance of the court, the custody of the marshal should have been released. Mere seizure could not give jurisdiction unless, as before stated, there existed a right to seize. If it is to be decided that admiralty has jurisdiction of any prop-

erty which is capable of physical seizure, or that the jurisdiction of the court proceeds from the fact that the thing was seized, it seems to us that the jurisdiction of admiralty is limited only by the various kinds of personal property capable of manual possession. In every case of a seizure, the question of the validity and the rightfulness of the seizure is one to be determined upon an examination of the libels under which the seizure was made. If the libels disclose the fact, as we claim in these cases they do, that the contracts are not maritime, or, in other words, that the subject-matter of the litigation is not within the jurisdiction of admiralty, the seizure must be adjudged to be irregular and one which cannot be maintained. For this reason we say that the claim made for the libellants, on page 4 of the brief, "that the court below therefore had jurisdiction of the parties and of the subject-matter of the action. It therefore had a right to decide the questions presented by the exceptions to the libels," is incorrect. The statement that the court below had jurisdiction over the subject-matter assumes the identical question in dispute. If the court had jurisdiction over the subject-matter, as shown by the allegations of the amended libels, it had power to seize the vessels and had power to determine all the controversies. If, however, the lower court did not have jurisdiction over the subject-matter, then it had no power to do any of these things, and that is precisely the point upon which we seek the determination of this court. It is purely jurisdictional, and this court is the only one to which we could have appealed.

On page 10 of the opposing brief, it is said, in reference to the argument in the original brief filed by us, and commencing on page 38 thereof: "This point is equivalent to a plea of prior adjudication." A comparison of the original libels with the amended libels will show that the allegations that "all the property in charge of the receiver of the state court, including the vessels libeled," were sold under the order of the court, were not contained in the original libels, but were inserted in the amended libels. With these amendments it became unnecessary to file exceptive allegations. The amended libels upon their face show all the facts, and made it possible to try these cases upon exceptions thereto. These exceptions are not intended to be the equivalent of a plea of prior adjudication, but are designed to raise a question of law as to the jurisdiction of the court over the subject-matter, upon the facts as shown by the amended libels and admitted by the exceptions.

This remarkable statement is made on page 10 of the brief: "Certainly any court in which such a plea was presented has undoubted jurisdiction to hear such plea and decide thereon. If this be not so, then it would only be necessary to set up a plea of prior adjudication, and then insist that the court was without jurdiction to hear it. According to appellants' argument, the court would be without jurisdiction to hear the plea, and such plea would therefore have to remain forever undecided." This is a peculiar deduction from the arguments made in the original brief, and is certainly

not justified by anything therein contained. Our contention, as we have before stated, is that a court must, whenever the question is raised, and at whatever stage of the proceeding it occurs, decide upon its own jurisdiction. It matters not whether this point is raised by a plea of prior adjudication, whether it is raised by a demurrer, or by exceptions, as in these cases, when the facts appear and are admitted, or whether it is raised during the course of the taking of testimony. The court must at once address itself to a determination of the point, and whatever may be its decision, under the act of 1891, this court is the only court to which an appeal may be taken.

It is stated, on page 2 of counsel's brief, that "on pages 25 and 49 of the appellant's brief, a statement is made that the vessels libeled were sold with other property for the benefit of the respondents, and that the respondents have received a portion of the proceeds of the sale. No such fact is stated anywhere in the record, and the statement is without foundation in fact." It is true that it is nowhere stated in the amended libels that the respondents received a proportion of the moneys arising from the sale of this property, but the amended libels show that all of this property, including the libeled vessels, was sold under the final decree of the equity court, in a proceeding the nature of which is disclosed. Our position in this regard is that it is the duty, under the undisputed law, of an equity court, in making final disposition of property which has been operated by it through a receiver, to provide in its

decree, first for the payment of the operating expenses incurred by the receiver. In case of a failure to make this provision, a decree would contain error, and this error could only be corrected upon direct appeal in the cause in which the decree was entered. We have assumed in our former argument, and we think we have a right to assume, that the decree of the court of equity was rendered in conformity to the law, and did make the provision for the distribution of these funds as stated in the brief. The correctness of that decree cannot be questioned here. However, it makes no difference for the purposes of our argument whether the libellants accepted their pro rata or whether they declined it. If they accepted it, they are entitled to no more; and if they declined it, that fact would not give admiralty jurisdiction over the subject-matter of this litigation.

It is not necessary to consider all of the arguments contained in the portion of the brief referred to. The same error prevails throughout. Counsel has assumed that it is conceded that the lower court had jurisdiction of the subject-matter. No such concession is made. That is the question we claim a right to have decided here.

Objection is made to the form of the certificate of the trial court, for the reason that "no question concerning the jurisdiction of the District Court of the United States for the District of Oregon over said cause has been certified to this court from the said district court for decision."

Further objection is made "that no question concerning the jurisdiction of the District Court of the United States for the District of Oregon over said cause has alone been certified to this court from the said court for decision, but, on the contrary, the matter undertaken to be certified to this court by the said district court involves questions not relating to the jurisdiction of said district court over this cause."

Some argument is presented in our original brief, pages 14 to 22 inclusive, touching the right to and form of appeal, which we request the court to consider in connection with the statements now to be made.

The portion of the federal statute governing the method of appealing to this court from a decision of a district or circuit court of the United States is as follows:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

Sup. to Rev. Stat. 1874-1891, p. 903, sec. 5.

The following is the form of the appeal in all of these cases:

"The above-named claimants, * * * conceiving themselves aggrieved by the final judgment rendered herein on the * * * day of * * * 1895, in the above-entitled proceedings, do hereby appeal from

the said final judgment to the Supreme Court of the United States, and they pray that this, their appeal, may be allowed, and that the question of the jurisdiction of the above-entitled court to render said judgment be certified to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States." Subsequent to the filing of this petition for an appeal, the claimants filed their assignment of errors in the district court. The district court, in the order allowing the appeal, made the following certificate:

"Be it remembered that on this day in the above-entitled cause came Wm. T. Muir, of proctors for claimants, and filed herein his assignment of errors, and petition for an allowance of an appeal herein to the Supreme Court of the United States from the decree herein rendered on * * * 1895, which decree is as follows, to-wit: (Here follows copy of the decree.) And in open court the said claimants, by their said proctors, prayed that said appeal be allowed, and tendered a bond with sufficient surety to the approval of the court, which bond is hereby approved, to stay proceedings herein until said appeal shall have been determined, and thereupon the court hereby allows said appeal and approves said bond, and execution is hereby stayed until the determination of said appeal. And this court does hereby certify and make known unto the Supreme Court of the United States that the *only*

question arising upon said appeal is the *question* as to whether or not, under the facts stated in the amended libel and the exceptions thereto, this court acquired or had jurisdiction to hear or pronounce the said decree, and that the following is a copy of the said amended libel and the exceptions thereto. (Here follows copy of the amended libel and the exceptions.)" This allowance of appeal and certificate was signed by the judge of the court below.

As we understand it, a certificate of the trial court is necessary, under the act of 1891, to give this court jurisdiction in any case. Maynard v. Hecht, 151 U. S. 324. This jurisdictional prerequisite is certainly met by the certificate above referred to. The remaining question is whether the certificate is in proper form. A number of decisions have been rendered by this court upon objections raised as to the form of the certificate. We have found no case where there was a certificate satisfying this jurisdictional prerequisite, in which this court has held that the form of the certificate as a matter of practice was insufficient; on the contrary, whenever the certificate has been made by the trial court, this court has held that it had jurisdiction to determine the jurisdictional question certified.

The form and character of the certificate is a question of practice. It is not prescribed by the statute, and this court has not announced a rule covering the point, nor defined precisely how the certificate should be framed. Taken together, the petition for an appeal,

the allowance of the appeal, and the certificate of the judge, are equivalent to a statement by the lower court to this court that "these (referring to and copying the amended libels) are the undisputed facts; that the question raised on these appeals is whether, under these undisputed facts, a court of admiralty had jurisdiction to hear and determine the cause." It seems to us that no more satisfactory course could have been pursued. It was not necessary for the court below to state in its certificate that the question was whether a court of admiralty had jurisdiction to enforce a receiver's contract, and to state specially the other matters necessary to a clear comprehension of the particular character of the contracts and the claims made thereunder, because all of these facts appear as clearly and as briefly from the facts certified to this court as they could have been made to appear by a certificate of the court reciting, independently of the amended libels, the facts stated therein. We submit that the amended libels do not state any fact not necessary for the consideration of the court in the determination of this controversy, and that the judge of the court below could not have stated these facts more clearly or in shorter compass than they are stated in the certificate. We are inclined to the belief that if any of the facts stated in the amended libels had been omitted from the certificate of the judge or the record sent up, counsel on the other side would have had some reason for complaint, on the ground that the true nature of the controversy was not disclosed by the record forwarded to this court.

The lower court, in its opinion, asks and decides this question (see p. 744, 69 Federal Reporter): "Does the fact that the wages are earned in an employment by a receiver take the case out of the general rule which confers jurisdiction upon the admiralty courts for any reason?" This expression of the lower court in its opinion, which is certified to this court, shows the nature of the jurisdictional question decided by that court. The argument and the reasoning of the court does not affect the character of the question which was before it. In Shields v. Coleman, 157 U. S. 168, and in Smith v. McKay, 161 U. S. 355, 357, the lower court certified to this court the portions of the record necessary to be considered on the appeals, and this court held that that was a proper method of stating the question of jurisdiction. This course was pursued in these cases. The certificates state that the appeals were taken *only* on the *question* of jurisdiction. The precise question in each case plainly appears from the certificates to be, whether the contracts alleged in the amended libels were maritime contracts, and, in consequence, whether the lower court had jurisdiction over the subject-matter of the controversy.

The objection raised, that no question concerning the jurisdiction of the district court over said cause has *alone* been certified to this court is met by the terms of the certificate itself. The lower court, as shown above, in its certificate has said:

"This court does hereby certify and make known unto the Supreme Court of the United States that the *only question* arising upon said appeal is the question as to

whether or not, under the facts stated in the amended libel and in the exceptions thereto, this court acquired or had jurisdiction to hear or pronounce the said decree."

It would seem, therefore, that no genuine fault can be found with the form of the certificate, nor can it be successfully contended that the court below has assumed to make a broader certificate to this court than authorized by the statute above quoted. It is stated in the original brief that the last two questions discussed therein may not be considered jurisdictional questions. The argument upon the appeals must not, however, be confounded with the appeals themselves, nor with the certificate of the question to be decided. It appears plainly, from the undisputed facts certified, that the only question certified is whether the contracts alleged in the amended libels are maritime contracts. The last two questions were discussed, as stated in the brief, because there are conflicting decisions of the federal courts upon the points, and it was thought, in the interest of harmony of decision, they should be finally determined by the court of last resort. The appeals have been properly taken, and the jurisdictional question has been duly certified. The validity of the appeals cannot be affected by any argument made extending to questions which may not be considered jurisdictional ones. The argument will not be considered.

Respectfully submitted,

WILLIAM T. MUIR,
Of Proctors for Claimants.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

Portland, Or., Oct. 23, 1897.